United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig. w/ affidavit of mailing

75-2101

To be argued by
ELIA WEINBACH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2101

B
P/S

JAMES W. COUNTS,
Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ELIA WEINBACH,
Assistant United States Attorneys,
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Preliminary Statement

James W. Counts appeals from an order of the United States District Court for the Eastern District of New York (John Bartels, *J.*) entered on November 27, 1974, denying his petition pursuant to 28 U.S.C. § 2255 for vacation of the ten year sentence imposed by the late Judge Rosling on June 26, 1972, and for resentencing. Appellant is presently incarcerated under that sentence which was imposed by Judge Rosling after a jury found him guilty of robbery of government property, 18 U.S.C. § 2112.[1] Appellant sought the writ on the grounds that Judge Rosling considered in imposing sentence a state con-

[1] This Court affirmed appellant's federal conviction on appeal on January 2, 1973. *United States* v. *Counts*, 471 F.2d 422 (2d Cir. 1973) (Oakes, *C.J.*). Zedrich Elam, appellant's co-defendant, was also convicted on the same indictment and also sentenced to ten years imprisonment.

viction and sentence that appellant was serving at the time of imposition of the federal sentence but which has subsequently been reversed.[2]

In denying appellant's § 2255 motion, Judge Bartels noted that he had served on the panel which considered appellant's sentence; that he had examined the sentencing minutes and was familiar with the basis for appellant's sentence; and that the state sentence played no part in Judge Rosling's consideration as to the term of the sentence to be imposed.

Statement of the Case

A. Evidence Adduced at Trial[3]

On November 14, 1970, the appellant and Zedrich Elam, his co-defendant at trial, forced their way into a motel room at the Holiday Inn near Kennedy airport.[4] They knocked at a room occupied by a federal sky marshal who was asleep. The sky marshal opened the door and appellant sprayed a substance into his eyes. A struggle ensued, and appellant and Elam entered the room. Elam held a large bolo-machete knife against the sky marshal's throat, telling him that if he moved he would have his head cut off. Appellant went through the sky marshal's possessions and eventually he and Elam took a government-issue revolver and several personal credit cards. Appellant and Elam were subsequently tried and convicted

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[2] Appellant's state conviction was reversed by the New York State Supreme Court, Appellate Division, Second Department, on May 20, 1974. *People* v. *Counts*, 44 AD 2d 841.

[3] A more elaborate statement of the trial evidence can be found in this Court's opinion (at 471 F.2d 422, 444) which affirmed the judgment of conviction.

[4] Appellant simply notes that the theft took place at John F. Kennedy Airport. Appellant's Brief, at 3.

by a jury of stealing and taking by force and violence property of the United States (the revolver) while it was lawfully in the possession of an officer of the United States.

B. Sentencing Proceedings

On June 26, 1972, appellant appeared before Judge Rosling for sentencing. Prior thereto, an eight page pre-sentence report had been prepared.[5] In addition to outlining the facts concerning appellant's criminal conduct, the pre-sentence report noted that appellant was being held on a writ from New York State for a ten year state sentence imposed on March 15, 1972, for drug crimes. The pre-sentence report recites the details of the federal crime for which appellant was convicted and points out that on November 29, 1970, New York City detectives entered Counts' home in Queens on a warrant related to local charges of possession of dangerous drugs and bail jumping. Appellant Counts and Elam were at Counts' home when the search of the apartment revealed the .38 caliber Colt Detective Special belonging to the federal sky marshal as well as numerous airline boarding passes bearing the sky marshal's signature.

The pre-sentence report states that appellant denied the offense, claiming that he was at home with his wife when it occurred.[6] Appellant also claimed that the police had "planted" the sky marshal's revolver in his apartment

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[5] In addition to the pre-sentence report there was also submitted a one-page report, dated April 24, 1972, from the Federal Detention Headquarters, Medical Department. The Government will provide each member of the panel with a copy of appellant's pre-sentence report which provides in greater detail the dates, circumstances, and dispositions of appellant's prior arrests.

[6] Appellant did not testify at trial.

by throwing it in from the outside. The pre-sentence report further indicates that appellant's criminal history extended back to March 1967, when at age sixteen he was arrested as a youthful offender for forgery and possession of burglar's tools. After appellant's first arrest and conviction at sixteen as a youthful offender he was thereafter convicted for criminal possession of stolen property, petit larceny, and, on two occasions, criminal possession and sale of dangerous drugs. (The drug sale conviction was the one reversed by the Appellate Division).[7]

At the sentencing, Judge Rosling turned over to appellant's attorney a copy of the pre-sentence report. Counsel for appellant moved to set aside the jury's verdict on the ground that the evidence was "insufficient and incredible as a mater of law." (S. 5)[8] Counsel for appellant based his motion on the allegedly inadequate identification made by the sky marshal of appellant. Judge Rosling denied the motion, noting that appellant's identification was a question of fact for the jury and that he had "little doubt that they [the jury] had the right defendant" (S. 7). Judge Rosling addressed appellant personally, informing him of his rights of allocution, but appellant deferred to his attorney (S. 9). Appellant's counsel stated that he had read the pre-sentence report and acknowledged that appellant had been arrested on a number of occasions and was serving a "rather lengthy indeterm-

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[7] In addition, two state charges for robbery and attempted murder were pending against appellant at the time he was sentenced by Judge Rosling. The Government has been advised by the Queens County Clerk's Office that appellant was acquitted after trial in June 1972 of all robbery charges. On February 9, 1973, appellant pleaded guilty to reckless endangerment and was sentenced to one year.

[8] Numerals preceded by "S" refer to pages of the minutes of the sentencing proceeding which has been reproduced as Appendix B in this appeal.

inate sentence of up to ten years," imposed in state court. Judge Rosling asked counsel if appellant was serving his state sentence "presently" (S. 9) and appellant's counsel responded affirmatively (S. 10). In his allocation appellant's counsel appealed for mercy, to which appeal Judge Rosling responded: "How can I be lenient" (S. 11). Appellant's counsel then asked Judge Rosling to run the federal sentence to be imposed concurrent to the state sentence being served by appellant (S. 11-12). Judge Rosling then informed appellant's counsel:

> "I held the trial of this case. I don't need any other sentencing to persuade me what to do." (S. 12).

Judge Rosling then sentenced appellant to a ten year sentence to run consecutive to appellant's "present" imprisonment in the state prison (S. 13). Judge Rosling ordered a Notice of Appeal to be filed on appellant's behalf (S. 15).

C. Post-Conviction Collateral Proceedings

Appellant's state court conviction, pursuant to which appellant was serving a sentence at the time Judge Rosling imposed federal sentence, was reversed on May 20, 1974. *People* v. *Counts*, 44 A.D. 2d 841 (2d Dept.). On November 8, 1974, appellant filed a *pro se* §2255 petition to vacate and set aside or correct his sentence in this case. Appellant argued that Judge Rosling took into consideration in imposing sentence the state conviction that was reversed after he had been sentenced on the federal crime. By order of Judge Bartels, entered November 27, 1974, appellant's petition was denied. Judge Bartels stated in part:

> This Court served on the panel which passed on petitioner's sentence and has examined the

> minutes of his sentence and is familiar with the basis for that sentence. Both petitioner and his co-defendant were sentenced to ten years, to run consecutively to the state conviction that each was then serving. Petitioner has a criminal record beginning from the time he was a minor and ending on the date of this sentence. At the time of the imposition of this sentence, petitioner had been sentenced by the state court to a maximum term of ten years for the sale of heroin and there was also pending before the state court a charge of attempted murder and robbery in the first degree. He could have been sentenced by Judge Rosling to a maximum term of fifteen years. At the time of sentencing Judge Rosling considered, according to the minutes, the fact that petitioner was currently in custody under a state sentence. The state sentence played no part in Judge Rosling's sentence of petitioner which was based upon the nature of the crime for which he was convicted in this Court, and the intention was to impose a sentence of at least ten years. Therefore, there is no need for resentencing under the holding of *United States* v. *Tucker*, 404 U.S. 443 (1973). (Memorandum-Decision and Order, pp. 1-2).

Appellant filed a notice of appeal *pro se* dated December 9, 1974. On May 29, 1975 counsel for appellant filed a petition on appellant's behalf pursuant to 28 U.S.C. § 2255 in the United States District Court for the Eastern District of New York, setting forth the argument's raised in appellant's earlier *pro se* § 2255 motion. Subsequently, the United States Attorney's Office informed counsel for the appellant that appellant's *pro se* motion had been denied by Judge Bartel's order, entered November 27, 1974, and that appellant had filed a notice of appeal *pro se* in this Court, dated December 5, 1974. Counsel

for appellant then petitioned the United States District Court for the Eastern District of New York for permission to withdraw his petition dated May 29, 1975, filed pursuant to 29 U.S.C. § 2255, and leave to withdraw the petition was granted by order of Judge Bartels, entered August 9, 1975. By order, dated July 17, 1975, this Court granted counsel for appellant's petition to appoint the Legal Aid Society, Federal Defender Services Unit as counsel on appeal.

ARGUMENT

The trial court did not consider adversely appellant's state court conviction, subsequently reversed, in sentencing.

Appellant argues that the late Judge Rosling considered appellant's state conviction, later reversed, in imposing the federal sentence and that such consideration violated appellant's rights under due process. Appellant assumes that Judge Rosling considered the state sentence because appellant's state conviction and sentence were included in the pre-sentence report; counsel for appellant at trial requested that the federal sentence be permitted to run concurrently with the state sentence; and Judge Rosling ordered the federal sentence to be served consecutive to the state sentence. Appellant's Brief, at 8, footnote 3.

Although counsel has stated appellant's contention ambiguously, that is, that Judge Rosling "considered" the state conviction, it is apparent that appellant's contention must necessarily rest upon a showing that adverse consideration was given the conviction. See, *United States* v. *Needles*, 472 F.2d 652 (2d Cir. 1973); *United States* v. *Brown*, 479 F.2d 1170, 1173-4 (2d Cir. 1973; *United States* v. *Schwarz*, 500 F.2d 1350, 1351 (2d Cir. 1974). Accordingly, appellant's contention is treated here in that

light. In such a posture, this case presents therefore, a fundamentally different situation than the cases cited by appellant, for it is clear that Judge Rosling did not rely on the state conviction and sentence when he sentenced appellant. Cf. *United States* v. *Tucker*, 404 U.S. 443; *McGee* v. *United States*, 462 F.2d 243 (2d Cir. 1973).

The Government does not deny that Judge Rosling was *aware* of the fact that appellant was serving a state sentence when he sentenced him on the conviction for a federal crime. Prior to the time of trial as well as at the time of sentencing Judge Rosling knew that appellant had been convicted of a state crime and had been sentenced. The Government vigorously rejects, however, the argument that because Judge Rosling knew of the state conviction and sentence[9] and because he ordered the federal sentence to run consecutive to the state sentence he must have necessarily or specifically considered adversely the state sentence in imposing the federal sentence. The Government suggests that there are at least three bases on which this Court should reject appellant's argument.

First, the minutes of the sentencing are clear, direct, and unambiguous, and appellant chooses to ignore the exact words of Judge Rosling which show beyond dispute that Judge Rosling did not consider *at all* the fact of appellant's state conviction and sentence in imposing federal sentence. Judge Rosling stated in response to the request of appellant's counsel to run the federal sentence concurrent to the state sentence:

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[9] Since the state conviction and sentence were outstanding at the time Judge Rosling sentenced appellant it cannot be argued that there was misinformation before Judge Rosling *at the time* sentence was imposed. Cf. *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1972); *United States* v. *Needles*, 472 F.2d 652 (2d Cir. 1973).

> "I held the trial of this case. *I don't need any other sentencing to persuade me what to do.*" (Emphasis added). (S. 12).

Thus, the record here is not silent on whether Judge Rosling considered the state sentence, nor is it impossible to determine from the records of the judge at the sentencing proceeding the extent to which he had been influenced by the conviction on the count subsequently set aside, Cf. *McGee* v. *United States*, 462 F.2d 243, 247 (2d Cir. 1973).

Second, Judge Bartel's Memorandum-Decision and Order, entered November 27, 1974, states categorically (at p. 2) that the "state sentence played no part in Judge Rosling's sentence of petitioner which was based upon the nature of the crime for which he was convicted in this Court, and the intention was to impose a sentence of at least ten years." Judge Bartels was in a unique position to determine that the state sentence played no part in the imposition of the federal sentence because he served on the panel which passed on appellant's sentence and stated that he was familiar with the basis of that sentence. Appellant notes that Judge Bartels denied the *pro se* § 2255 petition without assigning counsel and without a hearing, but it is clear that Judge Bartels acted properly, *Hodges* v. *United States*, 368 U.S. 139 (1961); *Williams* v. *United States*, 503 F.2d 995 (2d Cir. 1974). Judge Bartels participated on the sentencing panel. He was familiar with the case. He knew, therefore, that appellant's claim was (and is) ::insubstantial, immaterial, conclusory and palpably false." *Id.* at 998.

Third, the facts and circumstances of appellant's participation in a violent crime and his prior record as reflected in the pre-sentence report suggest that Judge

Rosling had ample basis, even without considering the state sentence subsequently reversed, to sentence appellant to a term of ten years.

Judge Rosling was well aware of the terrifyng circumstances of the crime for which appellant was convicted. This was no ordinary robbery of a government revolver "at John F. Kennedy Airport". Appellant and his co-defendant brutally entered a motel room where a federal sky marshal was sleeping, physically forced him to the floor and threatened him verbally and with a large bolo-machete knife.

Moreover, Judge Rosling had a pre-sentence report indicating appellant's past and continuing involvement in criminal activity apart from the state sentence subsequently reversed. Judge Rosling knew from the pre-sentence probation report that there was pending in Supreme Court, Queens County, two indictments for robbery I and attempted murder, which apparently were related to appellant's apprehension on the federal crime. Although the previous state charges had resulted in dismissals, conditioned and unconditional discharges, and, on one occasion, a fine, it is clear that Judge Rosling could have properly considered all of these charges in imposing sentence on the federal crime. *Williams* v. *New York*, 337 U.S. 241 (1949); *United States* v. *Sweig*, 454 F.2d 181 (2d Cir. 1972); *United States* v. *Doyle*, 348 F.2d 715, 720-21 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965). Yet, in spite of the record before him, Judge Rosling still showed leniency to appellant by not sentencing him to the maximum term of fifteen years.

Appellant also suggests that because consecutive sentences were imposed it therefore follows that Judge Rosling specifically considered adversely the state conviction

and sentence.[10] This Court has repeatedly held that "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review." *McGee* v. *United States*, 462 F.2d 243, 248 (2d Cir. 1972); *United States* v. *Sweig*, 454 F.2d 181, 183-84 (2d Cir. 1972). See *Gore* v. *United States*, 357 U.S. 386. There certainly is nothing extraordinary or improper about a federal court imposing a sentence consecutive to a state sentence. *United States* v. *Kanton*, 362 F.2d 178 (7th Cir. 1966), *cert. denied*, 386 U.S. 986; Wright, *Federal Practice and Procedure*, § 538 (1969). Indeed, there has been some question as to whether or not a federal court can order a federal sentence to run concurrently with a state sentence the defendant is already serving.[11] Wright, *Federal Practice and Procedure*, § 528 (1969) and cases cited therein.

The Government can see, therefore, no ineluctable nexus between appellant's contention and the fact that a consecutive sentence was imposed. Indeed, the fact of a consecutive sentence in this case is surely compatible with Judge Rosling's statement at sentencing:

> "I held the trial of this case. I don't need any other sentencing to persuade me what to do." (S. 12).

In all events, had a concurrent sentence been imposed in this case, one would hardly suppose that appellant, who would be facing the same prison term that he now faces, would concede that Judge Rosling had not given adverse consideration to the state sentence. In short, the fact

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[10] Appellant's Brief, p. 8, footnote 3.

[11] Title 18, U.S.C., § 3568 provides, *inter alia*, that the sentence of imprisonment: "[S]hall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence."

of a consecutive sentence in this case is irrelevant and, if not irrelevant, certainly more favorable to the Government's position.

For all of the aforementioned reasons it is beyond dispute that Judge Rosling did not consider adversely appellant's state conviction and sentence at the time he imposed federal sentence.[12]

CONCLUSION

The order of the district court should be affirmed.

Dated: September 22, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ELIA WEINBACH,
Assistant United States Attorneys,
(Of Counsel)

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[12] Should this Court decide, however, that resentencing is mandated it would not be inappropriate to appoint Judge Bartels since he is familiar with the facts of the case and served on the sentencing panel. In this regard, the Government cannot understand appellant's contention that Judge Bartels is somehow disqualified because he is more familiar with the case than some other member of the Eastern District bench. Indeed, the random assignment of appellant's petition to Judge Bartels seems the functional equivalent of a reassignment under Rule 25(b), F. R. Crim. P. It should not be altered, absent some compelling reason, merely because Judge Bartels is familiar with appellant's case and, because of that familiarity, appears disposed to sentence appellant to the same sentence.

★ U. S. Government Printing Office 1975— 614—353—142

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 24th day of September, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Services Unit
509 US Courthouse
Foley Square
New York, N.Y. 10007

Evelyn Cohen

Sworn to before me this
24th day of September, 1975

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission expires March 30, 1977

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tes Attorney,
for _____

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UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

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Attorney for _____

FPI-LC-5M-8-73-7355